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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1465

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
UNITED STATES DEPARTMENT OF LABOR,
GEO CONTROL, INCORPORATED
and NEW HAMPSHIRE INSURANCE COMPANY

PETITIONERS

vs.

GENEVIEVE O. RASMUSSEN
and WILLIAM C. RASMUSSEN, JR.

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEMORANDUM OF RESPONDENTS IN OPPOSITION

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1. The Decision of the Ninth Circuit is Correct

Petitioners in this matter argue that the Ninth Circuit decision[1] is erroneous, and in some respects insufficient in its analysis of the issue. In fact, a reading of the decision reveals a detailed analysis of the statutory amendments and the legislative history preceding the amendments.

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[1] *Dir. Office of Workers' Comp., Etc. v. Rasmussen*, 567 F.2d 1385 (1978).

The Ninth Circuit, at 1388 *supra* reviewed the extensive legislative history in this case, pointing out that the elimination of dollar maximums in death benefit cases was discussed time after time by senators, representatives and witnesses testifying on the proposed amendments. Further, the court noted that both the Senate and House of Representatives showed the excision of the dollar maximum from the death benefit section by bracketing the omitted language, and italicizing the new language.

The court rightly concludes at 1389:

> It is difficult to see how, in the light of this history and the manner in which the extent of the amendment was graphically illustrated, it can be maintained that Congress was unaware of the fact that while maximum limitations were imposed as to disability benefits they were eliminated as to death benefits.

Petitioners criticize this analysis nonetheless, apparently because the court did not focus its entire attention on Section 6(d) of the Act[2] and certain comments concerning it in the legislative history. The court did review Section 6(d) and petitioners' arguments thereon. The court, however, rejected petitioners' argument that Section 6(d) somehow incorporates into the death benefit section the disability benefits of Section 6(b)(1), because Section 9(e) is *not* ambiguous. Further, the entire legislative history must be examined, and the statute construed after weighing all relevant portions thereof.

Section 6(d)[3] is ambiguous. The specific portion of the legislative history purporting to explain section 6(d), heavily

[2] Longshoremens' and Harbor Workers' Compensation Act, Amendments of 1972, (hereinafter "the Act"), 33 U.S.C. see 606(d).

[3] Section 6(d) states:

Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for

relied upon by petitioners, is also ambiguous.[4] Reliance upon ambiguity to explain ambiguity is at best a murky exercise.

Petitioners' reading of Section 6(d) has two problematical results. First, it in essence rewrites Section 9(e). That section does not contain a dollar maximum. Petitioners would, in effect, have this Court insert therein the Section 6(b)(1) disability maximums. Such a function would be beyond statutory interpretation and would become statutory rewording - a legislative function. Such, of course, is not properly a judicial activity. *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 81 S.Ct. 557 (1960); *Elbert v. Poston*, 266 U.S. 548, 45 S.Ct. 188 (1924); *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 69 S.Ct. 1173 (1948); *Northern P.R. Co. v. North Dakota*, 236 U.S. 585, 35 S.Ct. 429 (1974); *U.S. v. Calamaro*, 354 U.S. 351, 77 S.Ct. 1138 (1956).

Secondly, Petitioners' reading results in defining the "determinations" of Section 6(d) to be the Section 6(b)(1) percentages, that is, the determinations are of maximum benefits. This directly conflicts with the clear and unequivocal statement from the Senate Report that these "determinations" are of national average weekly wage, as described at Section 6(b)(3).[5]

permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

[4] That legislative history consists of but one sentence:

To the extent that employees receiving compensation for total permanent disability or survivors receiving death benefits receive less than the compensation they would receive if there were no phase in, their compensation is increased as the ceiling moves to 200%.

S. Rep. No. 92-1125, 92d Cong. 2d Sess. 5 (1972);
H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 3 (1972).

[5] S. Rep. 92-1125, at 18 states: "Subsection [6](d) states that determinations *of national average weekly wage* made with respect to a period. . . . ." (emphasis supplied).

A thorough and unbiased examination of the legislative history indicates but one conclusion: That Congress was mindful of its activity, and chose to eliminate dollar maximums in death benefit cases while maintaing them in the form of a sliding ceiling in disability cases.

2. Resolution of the Issue

All petitioners here argue that this matter can only be resolved by this Court. It is respectfully submitted that there is an alternative. If petitioners verily believe that Congress has chosen an unwise course in this legislation, then it is from Congress that Petitioners should seek redress. The legislative route is the proper one where, as here, petitioners seek to rewrite a statute.

3. Importance of the Case

The granting of a petition for a writ of certiorari is a matter of sound judicial discretion. [6] One criterion to be considered in the exercise of that discretion is the importance of the case. The Solicitor General, in his petition at 11, 12 indicates that only some five cases per year will arise where this decision would affect the amount of benefits. The slight impact of this figure is placed in perspective by the fact that there are some 770,000 persons covered by the Act.[7]

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[6] Rule 19, Rules of the Supreme Court.

[7] *Petition for a Writ of Certiorari*, Geo Control, Inc. and New Hampshire Ins. Co., Petitioners, at 10.

4. Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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